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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Appellant,

v.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellees.

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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Appellees.

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Appellant.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers ("NAM") is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. Its members comprise

manufacturing and related concerns of all sizes located throughout the United States. NAM, therefore, represents a substantial number of the nation's industrial employers. Many of its members have income protection plans and, therefore, may be directly affected by the Court's decision in this case.

Additionally, if the decision below is affirmed, labor-management relations will be affected. Since numerous NAM members have collective bargaining agreements providing for payment of health and disability benefits, members may choose not to offer any such benefits rather than comply with the decision of the court below. Fundamental labor-management relations and policies will, therefore, be affected by this Court's decision.

Accordingly, the NAM has a proper interest in the resolution of the issues before the Court in this case.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1964 was enacted to implement and secure certain rights guaranteed by the Constitution. H. R. Rep. No. 88-914, 88th Cong., 2d Sess. (1963). The phrase "sex discrimination", as used in but undefined by the Act, can have only one meaning: the meaning that is compelled by the Constitution. This Court has already determined the constitutional definition in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). The "sex discrimination" prohibited by the Act must be the same as the "sex discrimination" prohibited by the equal protection clause. Since *Aiello* held that a plan identical to Appellant's in all material respects did not violate the equal protection clause, it follows that Appellant's income protection plan does not violate Title VII of the Act.

The EEOC Guideline relating to pregnancy, 29 CFR § 1604.10, is not entitled to the judicial deference normally accorded an administrative agency's action. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The legislative history concerning Title VII's sex discrimination provision and the social context which generated the 1964 Civil Rights Act clearly demonstrate that the Guideline is inconsistent with the intent of Congress. It, therefore, is to be accorded no judicial deference. *Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 94 (1973); *N.L.R.B.* v. *Brown,* 380 U.S. 278, 291 (1965).

Moreover, during the years 1966 through 1972, the EEOC maintained a policy that plans similar to Appellant's did not violate Title VII. Congress approved this policy by amending Title VII without altering that policy. Therefore, the EEOC Guideline, 29 CFR § 1604.10, is inconsistent with the intent of Congress.

THE ARGUMENT

I. The Phrase "Sex Discrimination" as Used in Title VII of the Civil Rights Act of 1964 Can Have Only One Meaning: The Meaning That Is Compelled by The Constitution as Formulated in Geduldig v. Aiello.

The Civil Rights Act of 1964 was enacted to implement and secure certain rights guaranteed by the Constitution.[1] H.R. Rep. No. 88-914, 88th Cong., 2nd Sess. (1963). The phrase "sex discrimination", as used in, and undefined by the Act, can have only one meaning: the meaning that is compelled by the Constitution.

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[1] "A number of provisions of the Constitution of the United States clearly supply the means 'to secure these rights' ['considered the birthright of all citizens']" . . . and this Act "resting upon this authority is designed as a step toward eradicating significant areas of discrimination on a nationwide basis." H.R. Rep. No. 88-914, 88th Cong., 2d Sess. 18 (1963).

Therefore, the "sex discrimination" prohibited by the Act must be the same as the "sex discrimination" proscribed by the equal protection clause.

This Court has already formulated the constitutional meaning of "sex discrimination" in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). That case held that an income protection program which excludes pregnancy from its list of compensable disabilities does not involve "discrimination based upon gender as such;" it does not violate the Constitution. *Geduldig* v. *Aiello, supra,* at 496-97 n.20. Since the plan now being reviewed by this Court is similar in all material respects to the plan in *Aiello,* Appellant's plan clearly does not violate Title VII of the Act.

The court below incorrectly concluded that *Aiello* is not dispositive of the issue now before this Court, because, the court maintained, *Aiello* involved interpretation of the Constitution, not the statute and administrative guideline involved in this case. *Wetzel* v. *Liberty Mutual Insurance Company,* 511 F.2d 199, 203 (3rd Cir. 1975). But it would seem apparent, if not axiomatic, that decisions that interpret the Constitution provide "valuable aid in determining the *legitimate boundaries of statutory meaning.*" 2A *Sutherland on Statutory Construction* § 56.04 (Emphasis supplied). Title VII must be construed "so as to comport with constitutional limitations." *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 571 (1973). These rules of statutory construction avoid a clearly absurd result; otherwise a statute implementing a provision of the Constitution could be interpreted to prohibit conduct which the courts had determined permissible under that very constitutional provision.

In *State ex. rel. Chobot* v. *Circuit Court for Milwaukee County,* 61 Wisc. 2d 354, 212 N.W. 2d 690 (1973), the court was required to construe the undefined term "obscenity" as it appears in the state's obscenity statute. The court supplied the definition formulated in the first amendment case, *Miller* v. *California,* 413 U.S. 15 (1973).

> [When] words which carry constitutional implications . . . [are] used without an express definition in the statute, the legislature must intend the courts to furnish its [*sic*] meaning from time to time as the constitutional concept of [the] words var[y].

Chobot v. *Circuit Court for Milwaukee County, supra,* at 696.

This court definitively stated in *Aiello* that an insurance plan's exclusion of pregnancy-related disabilities from compensable disabilities is not discriminatory on the basis of sex and, therefore, does not violate the Constitution. That holding supplies the constitutional definition of "sex discrimination". This Court must apply the constitutional definition of "sex discrimination" to that term's usage in Title VII; the constitutional definition is the statutory definition.

The case law demonstrates that there is only one definition of "sex discrimination". Opinions deciding Title VII cases freely adopt the definition of "sex discrimination" developed in the line of cases decided on equal protection clause grounds. Comment, *Geduldig* v. *Aiello*: *Pregnancy Classifications and the Definition of Sex Discrimination,* 75 COLUM. L. REV. 441, 467 (1975). In *U.S.* v. *Chesterfield County School Dist., S.C.,* 484 F.2d 70 (4th Cir. 1973), the court held that "the test of validity [of the employer's allegedly sexual-

ly discriminatory employment practices] under Title VII is not different from the test of validity under the fourteenth amendment." *Id.* at 73. (Citations omitted). The same logic is evident in *Rafford* v. *Randle Eastern Ambulance Serv., Inc.,* 348 F. Supp. 316 (S.D. Fla. 1972), which held an employer's dismissals of employees for violation of the company's no-beard rule did not violate Title VII because the dismissals would not violate the Constitution. See also, *Cohen* v. *Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1973) (Winter, J. dissenting), *rev'd.* 414 U.S. 632 (1974); *Gilbert* v. *General Electric Company,* 375 F. Supp. 367 (E.D. Va. 1974), *aff'd* — F.2d — (4th Cir. 1975).

Similarly, the definition of "sex discrimination" developed in Title VII cases has been used in opinions deciding sex discrimination cases brought on constitutional grounds. In *Scott* v. *Opelika City Schools,* 63 FRD 144 (M.D. Ala. 1974), a teacher challenged the school board's policy of dismissing pregnant teachers. The District Court said, in pertinent part,

> [i]f this case were being litigated under Title VII, defendants' maternity leave treatment would be unable to stand . . . .[T]his [same] result is equally called for under [the Constitution].

Id., at 149.

By applying the constitutionally mandated definition of sex discrimination, as determined in *Aiello,* it follows clearly that Appellant's income protection plan would not violate the equal protection clause if that applied directly. It is equally clear for the reasons stated above that the sex discrimination prohibited in Title VII does not—and cannot—prohibit more than that prohibited by the Constitution. By this standard, Appellant's income protection plan, therefore, does not violate Title VII.

II. Since the Coverage Exclusions in the Plan in Aiello and Appellant's Plan Are Identical, Appellant's Plan Must Be Found To Be Not Discriminatory.

Appellant's income protection plan is no different from the plan that was subject to this Court's review in *Aiello.* Since the plans are the same, they must receive equal treament. Appellant must be permitted to maintain its plan's pregnancy exclusion, in order for this Court's rulings to remain consistent.

There is authority dating back to 1892 for the proposition that persons and institutions that behave alike should be treated alike. In *Gandolfo* v. *Hartman,* 49 F.181 (C.C.S.D. Cal. 1892), a racially restrictive covenant was held to be non-enforceable. Even though the equal protection clause was not applicable to the transaction (there was no state action), the court, in effect, applied an equal protection standard to the parties to the contract; "[a]ny result inhibited by the [C]onstitution can no more be accomplished by contract of individual citizens than by legislation." *Id.,* at 182.

Similarly, in *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), the Court found the District of Columbia operating a segregated public school system like that found in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), to have violated the equal protection clause. The Court refused to allow the D.C. system to continue even though the equal protection violation argument was inapplicable.

> [I]n view of our decision [in *Brown*] that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

Bolling v. *Sharpe, supra,* at 500. See also, *Hurd* v. *Hodge,* 334 U.S. 24 (1948). With this principle in

mind, it is absurd to suggest that the State of California can validly maintain a pregnancy exclusion while Appellant cannot. Constitutionally permissible conduct in the case of a state cannot be statutorily prohibited conduct in the case of a private concern.

These cases, demonstrating that similar conduct is to be treated similarly, are applicable to this case. Although the court below attempted to distinguish *Aiello,* the two cases involve identical conduct. The issue is whether a particular aspect of the selective coverage of Appellant's plan is discriminatory. The material fact is the classification of pregnancy-related disabilities as non-compensable. This same issue was decided by *Aiello.* The court below never distinguished Appellant's plan and the plan in *Aiello* with respect to the fact that both excluded the same type of disability from coverage: pregnancy-related disabilities. Instead, it distinguished the cases by focusing on the fact that the plan in *Aiello* was supported totally by employee contributions and only normal pregnancy-related disabilities were excluded while Appellant's plan was supported only partially by employee contributions and excluded all pregnancy-related disabilities. The court below might have believed that since the employees alone contributed to the plan, those employees *voluntarily* submitted to a plan which did not cover all disability risks. Such a conclusion is incorrect; all employees not protected by an employer plan approved by the State must participate in the State plan. West's Ann. Un. Ins. Code §§ 3251-3254. Since some coverage for pregnancy-related disabilities is excluded under both plans, Appellant's plan should receive the same treatment as California's: it is not discriminatory.

III. The EEOC Guideline Is Not Entitled to Judicial Deference.

The EEOC Guideline relating to pregnancy, 29 CFR § 1604.10, is not entitled to the judicial deference normally accorded an administrative agency's action. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The legislative history concerning Title VII's "sex discrimination" provision and the social context which generated the 1964 Civil Rights Act clearly demonstrate that the Guideline is inconsistent with the intent of Congress. It, therefore, is to be accorded no judicial deference. *Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 94 (1973); *N.L.R.B.* v. *Brown,* 380 U.S. 278, 291 (1965).

The opinion in a recent Title VII decision stated that the legislative history regarding sex discrimination permits the negative inference that "Congress in all probability did not intend for its proscriptions of sexual discrimination to have significant and sweeping implications." *Willingham* v. *Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1090 (5th Cir. 1975) (*en banc*). During House debate on the 1964 legislation, consideration was given to the fact that the scope of the sex discrimination problem makes it an unsuitable topic for inclusion in the Act. Representative Emmanuel Celler read into the record a letter from the Secretary of Labor on that topic. The Secretary believed that the inclusion of sex discrimination would not be wise; the President's Commission on the Status of Women had previously concluded that "discrimination based on sex . . . involves problems sufficiently different from discrimination based on . . . other factors . . . to make separate treatment preferable." 110 Cong. Rec. 2485 (1964).

The Secretary's recommendation was rejected; sex discrimination is proscribed by the Act. This Court

is required to decide what type of employer behavior is an act of sex discrimination and, therefore, intended by Congress to be proscribed. This Court must consider the political, economic, and social context in which Title VII was passed, as well as its textual content. *Argosy Limited* v. *Hennigan,* 404 F.2d 14 (5th Cir. 1968). A particular portion of a statute must be construed "in conformity with its [the statute as a whole] dominating general purpose. . . ." *Carter* v. *Panama Canal Company,* 463 F.2d 1289, 1300 (D.C. Cir. 1972).

The Civil Rights Act of 1964 was written during a period of intensifying racial frustration and unrest. It was the expression of the American conscience's attempt to rectify decades of unconscionable treatment of blacks.[2] "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co., supra,* at 429-30. The Act outlawed employment practices which express an employer's stereotypical beliefs concerning blacks. The employer could no longer prefer to recruit, hire, fire, place, or promote an employee solely because of the employee's race.

The phrase "sex discrimination" must be interpreted in conformity with this general non-preferential legislative intent. Congress intended the Act, as enforced in part by the EEOC, to prohibit employers from "keeping the woman in her place." The male employee could no longer be preferred by an employer in the hiring and promotion process. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4 (1971). Title VII focuses on preferential employment practices: "discrimination based upon gender, [race, religion, and national origin] as such." *Geduldig* v. *Aiello, supra,* at 496-97 n. 20.

That type of employer action is not present in this case. "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Geduldig* v. *Aiello, supra,* at 496-97. The purpose of the Act is to equalize opportunity, not establish advantages for either men, women, blacks, or whites. If the decision below is affirmed, an advantage not contemplated by Congress would be created; pregnant women would be improperly afforded preferential treatment.

Moreover, at the time Congress amended Title VII, the EEOC maintained a long standing policy that income protection plans like Appellant's, which excluded pregnancy as a disability, did not violate Title VII. CCH Empl. Prac. Guide ¶17,304.43 (December 21, 1966). Neither the debate on nor the substance of the 1972 Amendments indicates congressional disapproval of this policy. The EEOC Guideline, adopted in 1972 *after passage of the Title VII amendments,* clearly is contrary to the will of Congress.[3]

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[2] I Statutory History of the United States (Chelsea House Publishers, 1970); President Kennedy stated that the Act was needed to meet "a rising tide of discontent that threatens the public safety." 109 Cong. Rec. 11,174 (1963); a major motive behind the passage of Title VII was "a desire to enhance the relative social and economic position of the American black community." Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1113 (1971).

[3] The court below is incorrect in its conclusion as to what EEOC administrative policy Congress approved. The opinion implies that Congress approved the Guideline policy when it enacted the 1972 Amendments. This is actually impossible since the Guideline was published in final form, 37 Fed. Reg. 6835 (1972), *after* the amendments became law.

The 1966 EEOC policy interpreted one aspect of "sex discrimination." Congress considered it to be an accurate representation of its intent concerning sex discrimination. This approval is evident in Congress's silence on the matter during consideration of the 1972 Amendments. *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *U.S.*, 377 U.S. 235 (1964).

The EEOC totally reversed its policy concerning pregnancy exclusions in income protection plans after the Congress approved its prior policy. 29 CFR § 1604.10. This change clearly was neither anticipated nor found necessary by Congress. It is not premised upon any congressional intent; the Guideline is not entitled to judicial deference. *Espinoza* v. *Farah Mfg. Co., supra.*

CONCLUSION

It is respectfully submitted that the phrase "discriminate . . . because of . . . sex," as it is used in Title VII of the Civil Rights Act of 1964, must have the same meaning as the constitutional meaning of the phrase. Since Appellant's income protection plan does not violate the Constitution, it does not violate Title VII. The decision of the court below must be reversed.

Respectfully submitted,

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